

MUNGER, TOLLES & OLSON LLP

RONALD L. OLSON
 ROBERT E. DENHAM
 CARY B. ELERMAN
 GREGORY P. STONE
 BRUCE A. BRIAN
 GEORGE M. GARVEY
 WILLIAM D. TEMKO
 JOHN W. SPIEGEL
 DONALD B. VERRILLI, JR. P.C.
 JOSEPH D. LEE
 MICHAEL R. DOYEN
 MICHAEL E. SOLOFF
 KATHLEEN M. M'DOWELL
 GLENN D. POMERANTZ
 THOMAS B. WALPER
 HENRY WEISSMANN
 KEVIN S. ALLRED
 JEFFREY A. HEINTZ
 STEVEN N. SENATOR
 JONATHAN M. ALTMAN
 KELLY M. KLAUS
 LISA J. DEMSKY
 MALCOLM A. HEINICKE
 JAMES C. RUTTEN
 RICHARD ST. JOHN
 ROHIT K. SINGLA
 CAROLYN HOECKER LUEDTKE
 KATHERINE M. FORSTER
 BLANCA FROMM YOUNG
 SETH GOLDMAN
 GRANT A. DAVIS-DENNY
 JONATHAN H. BLAVIN
 DAVID B. LEVIN
 MIRIAM JIM
 HALYN J. CHEN
 BETHANY W. KRISTOVICH
 JACOB S. KREILKAMP
 JEFFREY Y. WU
 LAURA D. SMOLOWE
 HEATHER E. TAKAHASHI
 ERIN J. COX
 BENJAMIN J. HORWICH
 BRYAN H. HECKENLIVELY
 ELAINE J. GOLDENBERG P.C.
 GINGER D. ANDERA P.C.
 MARGARET G. MARASCHINO
 JOSEPH G. GILRSLEEV
 ADAM B. WEISS
 JEREMY A. LAWRENCE
 ACHYUT J. PHADKE
 ZACHARY M. BRIERS

KURUVILLA J. OLASA
 JUSTIN P. RAPHAEL
 ROSE LEDA EHLER
 JOHN C. BROWN
 ROBYN K. BACON
 JORDAN D. SEGALL
 JONATHAN KRAVIS P.C.
 JOHN L. SCHWAB
 EMILY C. CURRAN
 L. ASHLEY AULL
 WESLEY T.L. BURRELL
 CRAIG JENNINGS LAVOIE
 JENNIFER L. BRYANT
 NICHOLAS D. FRAM
 VINCENT LING
 LAUREN BELL P.C.
 VICTORIA A. DEGTYAREVA
 JOHN B. MAJOR
 RACHEL M. MILLER-ZIEGLER P.C.
 FAYE PAUL-SELLER
 STEPHANIE G. HERRERA
 JULIANA M. YEE
 LAUREN C. BARNETT
 NICK R. SIDNEY
 SKYLAR B. GROVE
 LAURA M. LOPEZ
 COLIN A. DEVINE
 DANE P. SHIKMAN
 MAGGIE THOMPSON
 SAMUEL H. ALLEN
 ALLISON M. DAY
 GIOVANNI S. SAARMAN GONZÁLEZ
 SARAH MCGORMOTT
 J. MAX ROSEN
 ANNE K. CONLEY
 DAVID W. MORESHED
 ROWLEY J. RICE
 LAUREN E. ROSS
 BENJAMIN G. BAROKH
 ABE DYK
 MEGAN MCCREADIE
 RAQUEL E. DOMINGUEZ
 ARIEL TESHUA
 SHANNON GALVIN AMINIRAD
 XIAONAN APRIL HU
 CARRIE C. LITLEN
 JAMES R. SELZMANN
 SEAN P. BARRY
 MICHAEL I. SELVIN
 HUNTER V. ARMOUR
 NATHANIEL F. SUSSMAN

350 SOUTH GRAND AVENUE
 LOS ANGELES, CALIFORNIA 90071-3426
 TELEPHONE (213) 683-9100

560 MISSION STREET
 SAN FRANCISCO, CALIFORNIA 94105-3089
 TELEPHONE (415) 512-4000

601 MASSACHUSETTS AVENUE NW
 SUITE 500E
 WASHINGTON, D.C. 20001-5369
 TELEPHONE (202) 220-1100

December 13, 2024

OLIVER BROWN
 PAUL E. MARTIN
 MATTHEW MIYAMOTO
 MINDRAJAH M.
 REBECCA L. SORBRING
 CORY M. BATZA
 BRIAN R. BOESENECKER
 ROBERT E. BOWEN
 RICHARD T. JOHNSON
 GRACE DAVIS FISHER
 LAUREN N. BECK
 CALEB W. PEIFFER
 GREGORY T. BISCHOPING
 JAMIE LUGURI
 STEVEN B. R. LEVICK
 JANELLE KRUMMEN
 WILLIAM M. ORR
 GABRIEL M. BRONSHTEYN
 CHRISTOPHER J. CANNING
 ALEX C. WEINER
 ROSIO FLORES ARRIBAGA
 JESSICA O. LAIRD
 ERICA C. TOOCHE
 SARAH E. WEINER
 EVAN MANN
 ANDREW T. NGUYEN
 NATALIE G. MOYCE
 RACHEL M. SCHIFF
 MIRANDA E. REHAUT
 STEPHANY REAVES
 LAUREN E. KUHN
 J. KAHL DAY
 GARRETT J. BURG
 TED KANG
 ADAM W. KWON
 JOSEPH N. GLYNN
 SIMON K. ZHEN
 CARSON J. SCOTT
 CHRISTOPHER B. CRUZ
 MATTHEW W. LINSLEY
 ADEEL MOHAMMADI
 TAYLOR L. BENNINGER
 LORRAINE L. ABDULAHAD
 CLARE KANE
 SIDNEY M. EISNER
 HELEN ELIZABETH WHITE
 KAREN M. DOYLE
 ALISON A. DOYLE
 FELIPE DE JESUS HERNANDEZ
 JASON D. WEISS
 HENRY D. SHREFFLER

MILES W. UNTERREINER
 LYNDSEY FRANKLIN
 ANDREW DELAPLANE
 ARIELLA PARK
 LAURA R. PERRY
 NATASHA GEILING
 JOSEPH H. WYATT
 GRAHAM J. WYATT
 WESLEY P. DEVOLL
 LAUREN A. BILOW
 ROMAN LEAL
 KAYSIE GONZALEZ
 AMANDA HARRIS
 ALEXIS D. CAMPBELL
 KYRA E. SCHOONOVER
 WENDY Q. XIAO
 DANIEL KANE
 ADITI NAresh GHATLIA
 ALBERTO J. DE DIEGO-HABEL
 KYLE A. SCHNEIDER
 PRISCILA M. CORONADO
 CAROL WANG
 JEREMY P. LEWIN
 BOBBY H. KIM
 CLAIRE I. ROGERS
 EDUARDO A. GONZALEZ
 GRACE ORDONEZ
 LIAM GENNARI
 CHARLES LAM
 MICHAEL X. WEI
 MAGGIE BUSHELL
 REBECCA J. HANSEN
 CONNOR HOGE
 SARAH M. PFANDER
 ELIZABETH ANASTASI
 KEVIN HAN YANG

OF COUNSEL

PATRICK J. CAFFERTY, JR.
 PETER A. DETRE
 BRADLEY R. SCHNEIDER
 PETER E. GRATZINGER
 ADAM R. LAWTON
 SARAH J. COLE

SEE MTO.COM FOR
 JURISDICTIONS OF ADMISSION

Writer's Direct Contact
 (213) 683-9273
 (213) 683-5171 FAX
 Adam.Weiss@mto.com

VIA ECF

The Honorable Naomi Reice Buchwald
 United States District Judge
 Southern District of New York
 500 Pearl St.
 New York, NY 10007-1312

Re: SoundExchange, Inc. v. Sirius XM Radio, Inc.,
 No. 1:24-cv-5491 (NRB)

Dear Judge Buchwald:

I write in response to defendant Sirius XM Radio LLC's letter dated December 12, 2024 (ECF No. 74). Sirius asks the Court either to deny the *amici* (the American Association of Independent Music, the American Federation of Musicians of the United States and Canada, the Recording Industry Association of America, and the Screen Actors Guild) leave to file their *amicus* brief or, in the alternative, to grant Sirius five additional pages for, and seven additional days in which to file, its reply in support of its motion for judgment on the pleadings. Plaintiff SoundExchange, Inc. does not oppose Sirius's request for additional time and takes no position on the request for additional pages, *see* ECF No. 75—and certainly *amici* do not oppose either request. This Court can therefore simply grant Sirius the alternative relief it seeks, which would moot Sirius's opposition to *amici*'s request for leave to file a brief.

But regardless of whether the Court does so, Sirius has no sound basis for opposing *amici*'s request for leave to file their brief. First, Sirius is incorrect that the proposed brief is untimely.

MUNGER, TOLLES & OLSON LLP

The Honorable Naomi Reice Buchwald
December 13, 2024
Page 2

See ECF No. 74 at 2. Sirius relies on Rule 29 of the Federal Rules of Appellate Procedure, but Rule 29 by its terms governs only filings in the courts of appeals, *see Fed. R. App. P.* 29(a)(1), and Sirius has not identified any authority suggesting that the timing provisions of Rule 29(a)(6)—which refer specifically to the “appellant’s or petitioner’s principal brief,” *Fed. R. App. P.* 29(a)(6)—apply in this Court. In the district courts, “[t]here is no governing standard, rule or statute prescrib[ing] the procedure for obtaining leave to file an *amicus* brief”; rather, courts simply consider whether, under the circumstances, the brief would be “helpful.” *C & A Carbone, Inc. v. Cnty. of Rockland, N.Y.*, 2014 WL 1202699, at *3-*4 (S.D.N.Y. Mar. 24, 2014) (internal quotation marks and citation omitted). In any event, even under Rule 29, the court “may grant leave for later filing.” *Fed. R. App. P.* 29(a)(6); *see also* *Fed. R. App. P.* 26(b). And here, *amici* have not been dilatory, and Sirius will have eight days—or, if this Court grants Sirius’s requested extension, 15 days—to respond to *amici*’s brief.¹ That is more than enough time. *See Local Civil Rule 6.1(b)(3)* (reply briefs ordinarily “must be served within seven days”).

Second, Sirius is incorrect that the proposed brief is “improper.” ECF No. 74 at 1-2. Contrary to Sirius’s suggestion, *amici* and SoundExchange are far from interchangeable. *Amici* are trade organizations and unions representing a wide array of labels and artists who, by statute, receive the royalties that SoundExchange collects and distributes. *See 17 U.S.C. § 114(g)(2)*. Among those labels and artists are the “copyright holders” that Sirius argues can “protect their own interests” if SoundExchange has no cause of action to remedy underpayment. ECF No. 62 at 15. It is disingenuous at best for Sirius to suggest that those copyright holders have nothing relevant to say in this case.

The proposed brief also is not “redundant,” as Sirius apparently recognizes. ECF No. 74 at 2; *see id.* at 3 (requesting additional pages so that Sirius can “meaningfully respond” to *amici*’s

¹ SoundExchange filed its opposition to Sirius’s motion on November 26, 2024—two days before Thanksgiving. *Amici* sought Sirius’s consent to the filing of the *amicus* brief on December 9, eight business days after SoundExchange’s filing (assuming that the day after Thanksgiving is counted as a business day). Sirius did not respond to that request until late in the afternoon on December 10, at which point *amici* promptly filed their brief. And, contrary to Sirius’s suggestion, *see ECF No. 74 at 1 n.1*, this Court does not require a pre-motion conference before a potential *amicus* requests leave to file a brief. *See, e.g.*, Minute Order, *Planned Parenthood of N.Y.C. v. HHS*, No. 18-cv-5680 (NRB) (S.D.N.Y. Aug. 1, 2018), ECF No. 42 (granting leave to file *amicus* brief and expressly stating that no pre-motion conference is necessary). Among other things, this Court’s Individual Practices appear to contemplate a pre-motion conference only where a “party” anticipates filing a motion, Individual Practice Rule 2(B); *accord Kowalchuck v. MTA*, 94 F.4th 210, 214 (2d Cir. 2024), and *amici* are not parties, *see Cohen v. Empire Blue Cross & Blue Shield*, 176 F.3d 35, 41 (2d Cir. 1999). Nevertheless, if the Court were to require such a conference in these circumstances, *amici* respectfully request that the Court construe *amici*’s original submission as encompassing a request for a pre-motion conference. That would cause no prejudice to Sirius, which has already responded within three days.

MUNGER, TOLLES & OLSON LLP

The Honorable Naomi Reice Buchwald
 December 13, 2024
 Page 3

arguments). For instance, unlike SoundExchange, *amici* explain why individual copyright holders are particularly ill suited to protecting their own interests in recovering underpaid royalties, including because they will likely never learn of any underpayment. *See ECF No. 72-1 at 11-13.* That is precisely the kind of *amicus*-specific “perspective” that contributes to a “complete and plenary presentation of difficult issues.” *C & A Carbone*, 2014 WL 1202699, at *3-*4 (citations omitted). Moreover, although Sirius chides *amici* for citing the most directly applicable precedent of the Second Circuit, *see ECF No. 74 at 2*, the proposed brief explains that Sirius’s statutory interpretation cannot be justified either under the three-part test set out in that decision (as SoundExchange argues) or under more traditional tools of statutory interpretation (as *amici* argue), *see ECF No. 72-1 at 4-8; see also id. at 6-8* (offering a more comprehensive treatment of the legislative history of the relevant statutes than SoundExchange does). And in any event, some overlap in arguments would be no reason to reject an *amicus* brief wholesale. *See C & A Carbone*, 2014 WL 1202699, at *4 (finding that *amicus* brief posed no risk of prejudice because, *inter alia*, court could “simply ignore” duplicative arguments).

Finally, Sirius is plainly incorrect in suggesting that the Court should deny *amici* leave to file a brief because *amici* oppose Sirius’s motion. *See ECF No. 74 at 2.* As is well settled, “there is no rule . . . that amici must be totally disinterested”; indeed, “courts have accepted that by the nature of things an amicus is not normally impartial.” *SEC v. Ripple Labs, Inc.*, 2021 WL 4555352, at *6 (S.D.N.Y. Oct. 4, 2021) (internal quotation marks and citations omitted). Sirius itself has frequently filed *amicus* briefs in cases in which it has a strong economic interest, and surely will continue to do so in the future.² The fact that Sirius’s interpretation of Section 114 would create absurd results for parties other than SoundExchange is no reason to reject a proposed *amicus* brief; it is a reason to reject Sirius’s arguments.

Respectfully submitted,

/s/ Adam B. Weiss
 Adam B. Weiss

cc: All counsel (via ECF)

² See, e.g., Motion of Sirius XM Radio Inc. for Leave to File a Supplemental Brief as Amicus Curiae in *Marks v. Crunch San Diego, LLC*, 2018 WL 2096209, at *2 (9th Cir. May 4, 2018) (noting that Sirius filed an *amicus* brief at the merits stage of the appeal, *see* 2015 WL 9449409, and that “Sirius XM has an interest in the outcome of this case” because the court’s ruling “could affect both Sirius XM’s business practices and its defenses” to certain lawsuits then “pending” against it); Brief of Amici Curiae Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. in *United States v. Broad. Music, Inc.*, 2004 WL 4964503, at *2 (2d Cir. Oct. 4, 2004) (*amicus* brief for Sirius’s predecessor company stating that it has a “particularized” financial “interest in the outcome of this proceeding” and “will be directly affected by the outcome of this proceeding”).